

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1107

To be argued by
RICHARD WEINBERG

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1107

UNITED STATES OF AMERICA

Appellee,

—v.—

WILLIAM CLEARY and GUSTAVO PASSARELLI,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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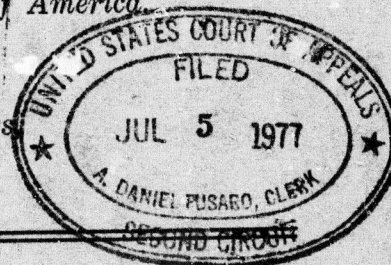


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—v.—

WILLIAM CLEARY and GUSTAVO PASSARELLI,
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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

William Cleary and Gustavo Passarelli appeal from judgments of conviction entered on February 24, 1977, in the United States District Court for the Southern District of New York, after a seven day trial before the Honorable Robert L. Carter, United States District Judge, and a jury.

Indictment 76 Cr. 986, filed on October 27, 1976, charged William Cleary, Gustavo Passarelli, and Jerome Healy with conspiring to misapply bank funds and to submit false bank loan applications, in violation of Title 18, United States Code, Section 371. In addition each defendant was charged in seven counts with misapplication of bank funds, in violation of Title 18, United States Code, Sections 656 and 2, and in four counts with the filing of false bank loan applications, in violation of Title 18, United States Code, Sections 1014 and

2. Cleary and Healy also were charged with three additional counts of misapplication of bank funds, and Cleary was charged with making false entries in bank records, in violation of Title 18, United States Code, Section 1005.

The trial of Cleary and Passarelli commenced on January 10, 1977.* On January 19, 1977, the jury returned guilty verdicts with respect to Cleary on the conspiracy count, and Counts Six, Seven, Eight, and Fourteen, which charged violations of the bank misapplication statute.** Passarelli was found guilty on the conspiracy count, and Counts Three, Four, Five, Seven, and Eight, which charged misapplications of bank funds, and Counts Ten and Twelve, which charged the filing of false bank loan applications.***

On February 24, 1977, Judge Carter sentenced Cleary to five years imprisonment on each count, but suspended execution of sentence and placed Cleary on probation for five years, or for such lesser period as determined by the probation department. On February 24, 1977, Judge Carter sentenced Passarelli to two years imprisonment on Counts Seven, Eight, Ten, and Twelve, suspended execution of all but six months, and imposed

* Prior to trial Healy pleaded guilty to Count Nine of Indictment 76 Cr. 986, which charged him with filing a false bank loan application.

** Cleary was acquitted on the other bank misapplication counts, the filing of false bank loan application counts, and the one count charging him with making false entries on bank records.

*** Passarelli was acquitted on Counts Two and Six, misapplication of bank funds, and Counts Nine and Eleven, filing false bank loan applications. Since Cleary had been acquitted on Counts Three, Four, and Five, Judge Carter entered a judgment of acquittal as to Passarelli on those counts in accordance with this Court's decision in *United States v. Giordano*, 489 F.2d 327, 330 (2d Cir. 1973).

a fine of \$2500 on Count Seven. Judge Carter suspended imposition of sentence on Count One as to Passarelli.

Passarelli is free on bail pending this appeal.

Statement of Facts

The Government's Case

A. Synopsis

In September, 1975 defendant Gustavo Passarelli faced acute financial problems in attempting to prevent foreclosure of his boat marina. Passarelli's problems were escalated because of his inability to secure loans from the Barclay's Bank of New York ("Barclay's Bank"), where he had experienced difficulty in prior transactions, and it was impossible for him to secure the necessary financing on his own.

Consequently, Passarelli retained an attorney, Jerome Healy, to help him obtain necessary loans. Healy had had prior business dealings with defendant William Cleary, assistant manager of a branch of Barclay's Bank. Passarelli and Healy agreed that Healy would try to arrange the necessary financing for Passarelli through Cleary. After Healy informed Cleary of Passarelli's inability to obtain a loan in his own name at Barclay's Bank, Cleary agreed to extend a five thousand dollar loan to Passarelli, using as the named borrower a relative of Passarelli's—Mary Roccario. In this manner, Cleary, Passarelli, and Healy launched a scheme to secure loans that Passarelli otherwise could not obtain, by disguising Passarelli's identity as the real borrower.

The initial five thousand dollar loan was not sufficient to meet Passarelli's needs. Realizing that he had

to protect Passarelli's property from foreclosure if Passarelli ever was to repay the initial loan, Cleary subsequently approved additional loans to Passarelli. From late September, 1975 through December, 1975 Cleary approved seven separate five thousand dollar loans: the proceeds of each loan were intended for Passarelli, but in each instance Cleary, Passarelli, and Healy disguised the identity of the true borrower—Gustavo Passarelli. Naturally, to obtain the loans, false documents were submitted to the bank.

No individual loan could exceed five thousand dollars because Cleary lacked the authority to approve any unsecured loan in excess of that amount. In addition, Cleary never met Passarelli, nor any of the named borrowers. In fact, the only information Cleary knew about Passarelli was negative—that he was in constant need of capital and could not receive a loan on his own through Barclay's Bank. Cleary had no reason to believe that the named borrowers were aware of any obligation to repay the loans if the true borrower, Passarelli, defaulted. Each time Healy informed Cleary that more money was needed to prevent foreclosure of Passarelli's property, Cleary's motive to grant the loan increased for he knew that the previous loans would be in jeopardy if Passarelli lost his property and his business.

Moreover, Cleary had substantial reason to doubt Healy's reliability. After the initial loan to Passarelli in the name of Mary Roccario, Cleary approved a five thousand loan for Healy. Following disbursement of the proceeds of this loan to Healy, Cleary received a credit report on Healy that undermined his financial stability. Armed with this knowledge, Cleary nevertheless approved numerous other loans based exclusively on Healy's instructions.

The Government established Cleary's and Passarelli's participation in the scheme through the testimony of

Healy and the named borrowers. In addition numerous documents received in evidence corroborated Healy's testimony, and revealed the full extent of the bank fraud. Finally, the testimony of a Federal Bureau of Investigation agent established Passarelli's efforts to obstruct the investigation.

B. The Proof at Trial

1. Passarelli needs financing to prevent foreclosure, and seeks Healy's aid in arranging loans through Cleary.

Gustavo Passarelli owned and operated a boat marina at 1 Westchester Avenue, Mamaroneck, New York. During the summer, 1975 Passarelli needed funds to refinance the mortgage on his marina, (Tr. 95),* and asked Jerome Healy, an attorney, to arrange the necessary financing. Healy first negotiated a loan for Passarelli from a Walter Steele, (Tr. 97), but, by September, 1975 Passarelli still needed additional funds to prevent foreclosure of his property. (Tr. 99, 335). Healy then agreed to see if the necessary loans could be secured through William Cleary, assistant manager of the Barclay's Bank of New York.** Passarelli advised Healy that his own reputation at Barclay's Bank was not favorable, so they agreed to use Passarelli's mother-in-law as the named borrower, while the loan proceeds would go to Passarelli. (Tr. 100-102).

* References to the trial transcript and to government exhibits are abbreviated as "Tr." and "G.E." respectively.

** Healy had transacted business with Cleary when Cleary worked at the Chemical Bank. (Tr. 570-72).

Passarelli in fact previously had encountered several problems in his dealings with Barclay's Bank. In 1973 he had a loan arrangement—referred to as a floor plan—with Barclay's relating to his automobile business. Problems developed with Passarelli's performance under the loan arrangement—he was consistently late with payments and allowed collateral discrepancies to arise—(Tr. 404-06), and, as a result, Passarelli was informed that the bank contemplated curtailing the loan arrangement. (Tr. 405, 716). By January, 1974 the bank had demanded that Passarelli pay off all of his loans from Barclay's Bank (Tr. 417), and in June, 1975 Passarelli was informed that his accounts at Barclay's were being closed. (Tr. 622).

Shortly after Healy agreed to arrange financing for Passarelli, he informed Cleary that his client, Gustavo Passarelli, needed additional capital, that Passarelli previously had transacted business with Barclay's, but since he had suffered business failures could not qualify for a loan. Healy suggested that they use Mary Roccario, Passarelli's mother-in-law, as the named borrower since she could qualify for credit. (Tr. 101-102).

Always anxious to generate business in order to further his own standing as a loan officer, Cleary quickly agreed to approve a five thousand dollar loan, knowing nevertheless that he was deceiving the bank by making it appear as if a credit worthy person—Mary Roccario—was receiving the loan, when in fact the loan proceeds were going to Passarelli, a man Cleary knew could not borrow money in his own name at Barclay's. Cleary gave the loan application forms to Healy who had Passarelli complete the forms. This application form as completed by Passarelli and Healy contained false statements. (Tr. 393-95; GX 1). Healy returned the completed application form to Cleary who approved the loan

in Roccario's name, although he knew the proceeds were intended for Passarelli. Cleary gave Healy the five thousand dollar check representing the loan proceeds, (Tr. 104-06; GX 3), and Healy, in turn, gave the check to Passarelli. (Tr. 107).*

Shortly after Cleary approved the first loan to Passarelli in the name of Mary Roccario, Cleary approved a separate five thousand dollar installment loan to Healy. (Tr. 108). Cleary later was notified by his bank that Healy had a substantial number of debts and was not a particularly reliable debtor. Consequently, Cleary concluded that he should not have made the installment loan to Healy and he requested that Healy repay the loan immediately. When Healy informed Cleary that he no longer had the loan proceeds, Cleary decided to alter the form of the loan from an installment loan to a time loan, and had Healy execute new documents to that effect. (Tr. 108-112).

2. Passarelli needs additional loans and Cleary approves these loans disguising Passarelli's identity as the true borrower.

Passarelli's newly found financial relief did not last for long. On approximately October 20, 1975, Passarelli again informed Healy that he needed additional funds to prevent foreclosure. Healy agreed to arrange another loan at Barclay's through Cleary. (Tr. 112). This time they agreed to list as the borrower 8626 Realty Cor-

* In making this initial loan Cleary violated a basic bank procedure that required interviewing or at least personally knowing the prospective borrower. (Tr. 13-21, 171). Cleary never met Passarelli or Roccario, and what he knew about Passarelli militated against the loan: Passarelli could not secure a loan from Barclay's in his own name because of business problems, and Cleary had no reason to believe that Roccario knew she could be liable for the loan.

poration, the record owner of Passarelli's property. (Tr. 112).

When Healy informed Cleary that Passarelli needed additional funds to protect the sale of his property by a foreclosure referee, Cleary again agreed to approve another five thousand dollar loan for Passarelli's use. (Tr. 113). Again mindful of Passarelli's bad record at Barclay's Bank, Cleary insisted that this time another corporate officer be used as the signatory on the loan. (Tr. 113). Healy relayed this request to Passarelli who proposed the use of Carmine Liberatore's name as a corporate officer. (Tr. 114-115). In fact, Liberatore was not, and never had been an officer of the corporation. (Tr. 374). Passarelli supplied to Healy false information concerning Liberatore for use in completing the financial statement. (Tr. 115, 373-24; GX 4, 5).^{*} Healy gave the completed application to Cleary who approved the loan and subsequently gave Healy the five thousand dollar loan proceeds. (Tr. 116; GX 6). Healy delivered the loan proceeds to Passarelli. (Tr. 116-117). Once again Cleary had approved this loan without meeting Passarelli or Liberatore. (Tr. 376), and Cleary had no reason to believe that Liberatore was willing to or capable of repaying the loan if Passarelli defaulted.

^{*} Despite the fact that Liberatore never had given Passarelli permission to sign his name on a loan application, (Tr. 375), Passarelli forged Liberatore's name to the application for the loan to 8626 Realty Corporation. (Tr. 115-16; GX 4, 5). Passarelli also forged Liberatore's signature on the bank note for that loan. (Tr. 118; GX 7).

Liberatore testified that prior to his appearance before the grand jury investigating this case, Passarelli confronted him in the waiting room for grand jury witnesses and importuned Liberatore to testify that he had given Passarelli permission to use his name. (Tr. 376).

Approximately one week after Cleary approved the loan to 8626 Realty Corporation, he was again urged by Healy to extend additional money to Passarelli, who desperately needed funds to protect his business. (Tr. 121). Cleary approved another five thousand dollar loan. This time the named borrower was the Westchester Avenue Marina, Inc., a corporation controlled and owned by Passarelli. (Tr. 120-123).

These frantic loan efforts still were to no avail. By approximately November 12, 1975, Passarelli remained in grave financial trouble and faced sure foreclosure. Healy and Passarelli then decided to obtain another loan through Barclay's in the name of Carl French. (Tr. 128). Without meeting French or knowing anything about him, (Tr. 133), other than that he was an associate of Passarelli's, Cleary approved a five thousand loan in French's name, with the proceeds again destined for Passarelli. (Tr. 129-130). French's financial application was completed by Healy based on information provided to him by Passarelli. The application contained several false statements, and Passarelli signed French's name to the application. (Tr. 130-132, 277; GX 15, 15(a)). Again, since Cleary had never met French, and knew nothing about him, Cleary had no genuine expectation that French was willing to or capable of repaying the loan.

3. Passarelli's financial needs become desperate, and Cleary must approve additional loans to protect the initial loans from default.

By the middle of November, 1975 Passarelli's financial situation had worsened. Passarelli's property was to be sold at auction on November 13, 1975, unless he could raise approximately \$9000. Healy told Cleary that foreclosure again was imminent and that Passarelli's sit-

uation had assumed crisis proportions. (Tr. 136, 222). Cleary, who by this time had improperly approved several loans knowing the proceeds were used to protect Passarelli's property, could not deny Healy additional money. He knew a foreclosure would diminish the chances of Passarelli's other loans being paid and thereby bring about default along with great risk to Cleary's own professional career and substantial personal embarrassment to his reputation in the banking community. Thus, Cleary immediately gave to Healy a five thousand dollar check payable to Joseph Passarelli, Gustavo Passarelli's brother. (Tr. 136; GX 22). Cleary also gave Healy another five thousand dollar bank check for Passarelli's use if he needed additional funds to forestall the imminent foreclosure sale. (Tr. 222-26, 721). Healy immediately went to the County Court House, where the auction was to occur, and gave the initial check to Joseph Passarelli who instantly signed it over to Gustavo Passarelli to give to the foreclosure referee. (Tr. 136-137).*

Despite these frenetic activities, the loan proceeds Passarelli had thus far received through Cleary still were not sufficient. By the end of November, 1975 he needed additional funds. Passarelli now suggested to Healy that they could secure a loan in the name of Thomas Power, a man who allegedly owed Passarelli money for a boat. (Tr. 141). Healy proposed this plan to Cleary, and Cleary, without meeting Power, agreed

* The loan in Joseph Passarelli's name was approved by a desperate Cleary without ever meeting Joseph Passarelli. In making this loan and dispensing the proceeds before the borrower's financial statement was filed with the bank, and prior to the signing of the note, Cleary acted in substantial violation of required bank procedures. (Tr. 24-26).

to approve the five thousand dollar loan to Power who would turn the money over to Passarelli. (Tr. 141-45).^{*} Healy received from Cleary the check representing the loan proceeds and gave it to Passarelli. (Tr. 143-44; GX 25). The check thereafter was endorsed "Westchester Avenue Marine", with an additional forged endorsement of Thomas Power, who of course never saw the check. (Tr. 309-12; GX 25). Prior to extending the loan Cleary never asked Power or anyone to execute a chattel mortgage security agreement. (Tr. 145), in direct violation of established bank procedures. (Tr. 22). Once again Cleary knew nothing about the named borrower's ability or willingness to repay the loan.

The last loan approved by Cleary to a corporation or individual controlled by Passarelli was one for five thousand dollars made on December 15, 1975, to the Westchester Avenue Used Cars Corporation. (Tr. 145-48). As in the past, Healy advised Cleary that more

^{*} Thomas Power in fact had never purchased a boat from Passarelli, and did not have the financial ability to buy any boat. (Tr. 309). Power was completely unaware that his name was being used as a loan recipient, and had nothing to do with providing the information on the loan application in his name. Consequently, a number of the statements on that loan application were false. (Tr. 143, 309-12; GX 23).

Passarelli, however, tried to maintain the fiction that Power had purchased a boat from him. When Passarelli was interviewed by a Federal Bureau of Investigation agent he maintained that Power had purchased a boat from him, and Passarelli showed the agent the boat Power allegedly had bought. He also showed the agent a check he claimed to have given to Power as a refund for the boat. (Tr. 340-41). The Government established that Power never purchased a boat, that the boat Passarelli claimed Power had bought was not worth anything near five thousand dollars. (Tr. 433-36; GX 58), and that the check Passarelli tendered to the Government as representing a refund to Power was never given to Power. Passarelli's actions in showing the agent any boat in his marina and the five thousand dollar check obviously were designed by Passarelli to obstruct the FBI's investigation. (Tr. 341-42; GX 44). See *infra* at 28.

money was needed to protect Passarelli's marina. Mindful of the ever expanding and unstable debt accumulating, Cleary approved yet another five thousand dollar loan for which only Passarelli ultimately would be responsible. (Tr. 147-48).^{*} No financial statement on behalf of the Westchester Avenue Used Cars, Corp., was ever submitted to Cleary. Cleary knew nothing about this corporation's assets or its ability to repay a loan. All he knew was that using the corporation's name would disguise the fact that the loan proceeds were going to Passarelli.

4. Cleary approves other loans for Healy's associates in violation of normal bank procedure.**

Cleary's approval of loans in violation of bank procedures was not limited to his efforts to protect Pas-

^{*} Of the seven loans Cleary approved for Passarelli's benefit, only one has not been charged off as a bad loan—the loan to Mary Roccario. Thus, the loans in the names of 8626 Realty Corporation, Westchester Avenue Marina, Inc., Carl French, Thomas Power, Joseph Passarelli, and Westchester Avenue Used Cars, have been charged off as bad loans by the bank. (Tr. 31-36, 83; GX 47, 49, 50, 51, 52, 53, 54, 55).

^{**} Prior to his employment at Barclay's Bank Cleary had violated established bank procedures at the Chemical Bank where he worked. Cleary had made loans that exceeded his credit authority. (Tr. 421). In making these loans to one individual, Cleary had completed the required documents so as to deceive the bank into believing he had not exceeded his lending authority. (Tr. 422, 426-27). Indeed when Cleary's misconduct was discovered at Chemical Bank he created a scenario to make it appear as if he had not exceeded his lending authority, when in fact he had. (Tr. 577-78). On cross-examination when confronted with records showing the falsity of his initial explanation, Cleary acknowledged that he had exceeded his lending authority. (Tr. 578). Moreover, while employed at Chemical, Cleary denied receiving any gratuities in connection with approving a loan. When confronted with a lie detector test, Cleary finally disclosed the truth—that he had received a gratuity. (Tr. 579-81).

sarelli's marina. Healy arranged two other loans that Cleary approved for individuals he had neither met nor knew, and where no financial statement or other application was filed. In one instance, Cleary and Healy resorted to a subterfuge to enable the borrower to receive a ten thousand dollar loan, in excess of Cleary's lending authority. (Tr. 14).

The first of these loans was made to Edward Hogan. Without meeting Hogan or requiring Hogan to file any financial statement or loan application, Cleary gave Healy a Barclay's Bank check for five thousand dollars made payable to Hogan. (Tr. 194-97, 269-70; GX 33, 34).

Shortly after extending the Hogan loan, Cleary approved a loan for Richard Fletcher. Healy told Cleary that Fletcher needed a ten thousand dollar loan. Cleary responded that his lending authority was only five thousand dollars, but that he would seek approval from a superior for the ten thousand dollar loan. (Tr. 151). Subsequently, Cleary informed Healy that he could not seek approval for the ten thousand dollar loan, but could approve a five thousand dollar loan without obtaining approval from his superiors. (Tr. 152-53). To provide Fletcher with the \$10,000 loan, Cleary agreed to loan five thousand dollars to Fletcher's mother who would then give that money to Fletcher. (Tr. 152-153, 315).^{*} He also gave Fletcher a five thousand dollar loan in Fletcher's own name. Thus, without meeting either Richard Fletcher or Margaret Fletcher, Cleary approved a loan in excess of his lending authority. (Tr. 317A). Indeed the loan was approved by Cleary without the

^{*} In fact Fletcher's mother knew nothing about the use of her name on a loan application. Richard Fletcher simply signed his mother's name to the note. (Tr. 315).

submission even prospectively of a financial statement or other loan application. (Tr. 315).

Defendant Cleary's Case

Defendant Cleary testified in his own behalf. He initially testified in considerable detail to his responsibilities at Barclay's Bank. (Tr. 480-99). With respect to the disputed loans, Cleary's basic refrain was that he had approved a number of loans based on Healy's representations that the borrowers were capable of repaying the loans.* Cleary claimed to have had no reason to believe that a person with insufficient assets or credit would be liable for the loans or that the loan applications contained false statements.**

With respect to the loan approved for Healy's personal use, (Tr. 515, 575-76), Cleary testified that Healy explained he had taken care of the debts revealed by the negative credit report, but that these debts had not been removed from the report. (Tr. 489, 492). According to Cleary's own testimony, after he had received the negative credit report on Healy, he still approved nine loans, each in the amount of five thousand dollars, based on representations made by Jerome Healy. (Tr. 576).***

* Cleary admitted that when previously employed at Chemical Bank he had approved loans for Healy. Indeed he had made two five thousand dollar loans to Healy that violated Cleary's lending limit. (Tr. 570-72).

** Thus, for example, concerning the initial loan in the name of Mary Roccario, Cleary testified that Healy told him Mrs. Roccario enjoyed a fine reputation and could repay the loan. (Tr. 477, 481). Cleary denied that Healy had informed him that the loan's proceeds were intended for Passarelli. (Tr. 584).

*** The loans were as follows:

(1) 8626 Realty Corporation (Tr. 525); (2) Westchester Avenue Marina (Tr. 527-28); (3) Carl French (Tr. 535-

[Footnote continued on following page]

Cleary was not certain when Healy first informed him that Passarelli needed money to protect his marina, or when he first discovered that Passarelli had prior difficulties with Barclay's Bank. He was certain, however, that Healy informed him of these matters and of Gustavo Passarelli's bad reputation at Barclay's, at some point prior to the extension of the loan in Joseph Passarelli's name. (Tr. 586-87). Cleary also acknowledged giving Healy a second \$5,000 check along with the initial check payable to Joseph Passarelli, in order to protect Gustavo Passarelli's interest in his marina. (Tr. 541).*

Cleary also conceded that Healy had told him that Passarelli was connected with 8626 Realty Corporation at the time he approved that loan. (Tr. 592). Finally, after extensive questioning on the point, Cleary further admitted that he "may have known" that Liberatore's name was used as the corporate officer on the 8626 Realty Corporation loan because of Passarelli's inability to secure a loan if his own name had been used. (Tr. 593-94).

Defendant Passarelli's Case

Gustavo Passarelli's case consisted of the testimony of himself, and three other witnesses—Julia Rabasca, Joseph Passarelli, and Janet Passarelli.

39); (4) Joseph Passarelli (Tr. 542-545); (5) Thomas Power (Tr. 545-46); (6) Westchester Avenue Used Cars, Inc. (Tr. 551-52); (7) Edward Hogan (Tr. 546-50); (8) Richard Fletcher; and (9) Margaret Fletcher. (Tr. 550-51).

* Cleary further admitted approving the Westchester Avenue Used Car loan after Healy explained to him that Passarelli had had problems at Barclay's Bank. (Tr. 589-90).

Julia Rabasca was the manager of a branch office of Barclay's Bank, and in 1972, Passarelli's loan officer. (Tr. 615). She testified that in 1972 and 1973 she approved loans of approximately twenty to twenty-five thousand dollars for Passarelli. (Tr. 617). According to Rabasca while Passarelli was sometimes delinquent in his loan payments, he always paid off the loans. (Tr. 617). She further testified, however, that she was asked by a bank superior to watch Passarelli's account, and that in June, 1975 she informed Passarelli that his account was being terminated because of its unsatisfactory condition. (Tr. 621-22).*

Joseph Passarelli, the defendant's brother, testified that he had borrowed five thousand dollars from Barclay's Bank on November 12, 1975, and, upon receiving the check, immediately gave it to his brother, Gustavo Passarelli. (Tr. 625-27). At the time the loan was secured, Joseph Passarelli had no intention of keeping any of the money, and was in fact not borrowing the money for himself. (Tr. 628).

Janet Passarelli, the defendant's wife, testified that in September, 1975 her mother, Mary Roccario, gave her permission to secure a loan in her name in order to repair the house. (Tr. 630-31). In flat contradiction of a prior statement, Mrs. Passarelli claimed that she signed her mother's name to the loan application, but that the application was blank when she signed.** Defendant's wife also testified that she provided Healy with

* The defendant Passarelli admitted during his testimony that Ms. Rabasca had told him she was closing his accounts. (Tr. 716).

** When Janet Passarelli was interviewed by an agent of the Federal Bureau of Investigation in June, 1976, she denied signing or filling out the loan application or installment note for the Mary Roccario loan. (Tr. 755-56).

truthful information about her mother's background and financial information. (Tr. 633-34). The proceeds of this loan were deposited to the account of Westchester Avenue Marina. (GX 3).

Defendant Passarelli testified in his own behalf. In essence, he denied knowing that any false statements or documents were submitted to Barclay's Bank, and denied filling out any of the documents submitted in connection with the loans. (Tr. 693).

Passarelli placed full blame for his problems on Healy. Thus, Passarelli testified that Healy had suggested that Passarelli apply for a loan at Barclay's Bank. (Tr. 660). He informed Healy that he did not want to borrow money from Barclay's Bank, (Tr. 660, 715), but Healy suggested that a relative borrow the money and lend that money to Passarelli. (Tr. 660). Passarelli had Healy speak to Janet Passarelli, who gave Healy information about Mary Roccario for the loan. Passarelli denied ever seeing the completed financial statement with the background information on Roccario; he admitted, however, receiving the proceeds of the loan. (Tr. 661-63).

With respect to the 8626 Realty Corporation, Inc., loan Passarelli denied seeing the completed financial statement containing information on Carmine Liberatore, or providing that information to Healy. (Tr. 669). Passarelli insisted that Liberatore had given him permission to use Liberatore's name as a corporate officer. (Tr. 667-68).

Despite admitting that he had received a portion of the five thousand dollar loan in the name of Carl French (Tr. 682), Passarelli testified he had nothing to do with providing the information on French's background and assets for the bank's financial statement.

(Tr. 678-82). Passarelli insisted that French borrowed the money through Healy's efforts and that French gave him part of the loan proceeds. Similarly, Passarelli claimed that the loan to Thomas Power was accomplished through the efforts of Carl French and Healy, and that he never saw the Power financial statement which was eventually filed with the bank. (Tr. 682-85). Moreover, Passarelli denied that he ever asked Healy to arrange for a loan for Westchester Avenue Used Cars, Inc., and never completed any financial statements or applications for that loan;* he was mystified as to how Healy secured this particular loan, and testified that Healy eventually received most of the proceeds from this loan. (Tr. 687-88).

Finally, Passarelli testified that it was Healy who suggested that a Barclay's loan for five thousand dollars be taken out in Joseph Passarelli's name. (Tr. 689). He conveniently recalled that the day before his receipt of the five thousand dollar Joseph Passarelli loan, his brother had offered to borrow money for him. (Tr. 690-91).

Passarelli acknowledged, however, owning the stock of 8626 Realty Corporation, (Tr. 648), Westchester Avenue Marina, Inc., (Tr. 651), and Westchester Avenue Used Cars, Inc. (Tr. 652). He further conceded that he had received the loan proceeds for the loans to Westchester Avenue Marina, Inc., (Tr. 673), Mary Roccario,

* The Government agreed that neither Passarelli nor anyone else ever provided Cleary with any type of financial statement or loan application for Westchester Avenue Used Cars, Inc. Indeed, Cleary was so anxious to go to whatever lengths necessary to protect Passarelli's marina, that Cleary disbursed the proceeds of this loan to Healy without having the benefit of any information on the financial condition of Westchester Avenue Used Cars, Inc.

(Tr. 717), 8626 Realty Corporation, (Tr. 718), Westchester Avenue Used Cars, Inc., (Tr. 687), and Joseph Passarelli. (Tr. 691, 720). He insisted that he received only a portion of the loans made payable to Carl French (Tr. 682, 720) and Thomas Power. (Tr. 685).

ARGUMENT

POINT I

The Evidence Was Sufficient To Support The Jury's Guilty Verdicts.

Both defendants claim that the evidence was insufficient to support the guilty verdicts on certain counts. Cleary contends that the evidence was insufficient on Counts One, Six, Seven, Eight, and Fourteen; Passarelli argues that the evidence was insufficient on Counts Seven and Eight.* These contentions are meritless.

* Passarelli was also convicted on Counts One, Ten and Twelve, but makes no sufficiency claim as to the conspiracy Count (Count One). Indeed, Passarelli offers no argument attacking on the validity of his conviction on Count One, and the conclusion to his brief only asks this Court to reverse the judgments of conviction on Counts 7, 8, 10 and 12. (Br. 50). Since Judge Carter charged the jury in accordance with *Pinkerton v. United States*, 328 U.S. 640 (1946) (Tr. 891-94), the jury could have properly convicted Passarelli on Counts Seven, Eight, Ten and Twelve if they found that Passarelli had entered the conspiracy charged in the indictment and that another defendant or co-conspirator committed the crime charged on Counts Seven, Eight, Ten and Twelve in furtherance of the conspiracy. On appeal Passarelli has not argued that Judge Carter's *Pinkerton* charge was improperly given or inadequate. In any event any such claim would be to no avail. See *United States v. Corr*, 543 F.2d 1042, 1049-50 (2d Cir. 1976); *United States v. Finkelstein*, 526 F.2d 517, 522 (2d Cir. 1975).

Defendants disregard the basic principle that in reviewing the sufficiency of the evidence this Court must view the evidence in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Hawley*, — F.2d —, Dkt. No. 76-1469, slip op. 3239, 3243 (2d Cir., April 27, 1977); *United States v. Leonard*, 524 F.2d 1076, 1081 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976). They cavalierly ignore the jury's right to credit the Government's witnesses, and to reject all or portions of the defendants' testimony. *United States v. Frank*, 494 F.2d 145, 153 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974); *United States v. Taylor*, 464 F.2d 240, 242-45 (2d Cir. 1972); *United States v. Simon*, 425 F.2d 796, 799 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970). Instead, defendants merely press here the same arguments unsuccessfully made to the jury and ask this Court to disregard its recent admonition that "we may not substitute our own view of the evidence for that of the jury." *United States v. Sears*, 544 F.2d 585, 586 (2d Cir. 1976). A fair reading of the record, however, plainly demonstrates that a reasonable juror could fairly find defendants guilty. *United States v. Hawley*, *supra*.

A. The Proof as to Cleary

The evidence at trial demonstrated that Cleary approved seven loans in the names of other persons or corporations with full knowledge that the proceeds of those loans were intended for, and to be used by, Passarelli to protect his business. Even before approving the initial loan, Cleary was specifically told that Passarelli was not well regarded at Barclay's Bank and could not secure a loan on his own. (Tr. 101-03). Thus, from the first transaction, Cleary participated in a scheme to prevent

bank officials from learning that Passarelli was the true borrower.*

With respect to each loan Cleary never met any of the named borrowers, nor did he meet with any of the ultimate recipients of the loan proceeds, Gustavo Passarelli, Richard Fletcher or Edward Hogan. Cleary argued to the jury that he accepted the representations of Healy that the named borrowers were financially capable of repaying the loans. In view of Cleary's receipt of substantial adverse credit information about Healy prior to the approval of all but one of the disputed loans, see *supra* at 7, the jury justifiably rejected Cleary's protestation that he accepted Healy's alleged representations that the borrowers were substantial people who knew about the loans. The jury was entitled to conclude Cleary knew that the intermediate borrowers were straw men, that the bank would have to look to Passarelli for repayment on the loans, and therefore, that it was improper to lend money to Passarelli.**

* For example, Cleary and Healy made the initial loan in the name of Mary Roccario rather than Gustavo Passarelli, and it was Cleary who suggested to Healy that a corporate officer other than Passarelli be the signatory on the loan to 8626 Realty Corporation. (Tr. 113).

** The Government also contended that Cleary knew the loan applications contained false statements. Cleary was acquitted on the false loan application counts and some of the bank misapplication counts. Similarly, Passarelli was acquitted on some of the false loan application and bank misapplication counts. The defendants' acquittals on these counts do not prevent reliance on evidence relevant to those counts in evaluating the sufficiency of the evidence as to the other counts. *United States v. Lubrano*, 529 F.2d 633, 636 n.1 (2d Cir. 1975); *United States v. Finkelstein*, 526 F.2d 517, 527 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976), *United States v. Sisca*, 503 F.2d 1337, 1344 n. 9 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974).

The most damaging evidence probative of Cleary's intent to injure or defraud the bank related to the loan in the name of Joseph Passarelli.* At the time that Cleary gave Healy the proceeds for this loan, Healy told Cleary that the defendant Passarelli desperately needed money to prevent the referee from selling his property on that very day. Cleary then saw the obvious: he had approved two five thousand dollar loans to corporations completely owned by Gustavo Passarelli, and two five thousand dollar loans to a relative and friend of Passarelli's; Cleary knew that the proceeds of these loans were going to the defendant Passarelli; he understood that if Passarelli's property was sold the other four loans would go into default because Passarelli's business would fail. In brief, Cleary was aware that he had acted improperly in the past and that Passarelli's fiscal difficulties had greatly jeopardized his own job and banking career. His motive to perpetuate the fraud on the bank was now at its peak. Cleary, therefore, without asking for or requiring completion of any loan application gave Healy a five thousand check made payable to Joseph Passarelli. (Tr. 136-37, 222-26, 721).

Indeed, Cleary's concern was so great that he gave Healy a second five thousand dollar check to be used if needed to protect Passarelli's property from foreclosure. These loans were still not sufficient and Cleary, whose future at the bank continued to be jeopardized by the

* Indeed, the jury convicted Cleary on the substantive bank misapplication counts relating to the Gustavo Passarelli loans beginning with the loan to Joseph Passarelli (Count Six), and the two loans approved thereafter (Counts Seven, Eight). Cleary was acquitted on loans he had approved prior to the Joseph Passarelli loan. The jury may well have concluded that prior to the Joseph Passarelli loan Cleary's intent was ambiguous, but had no doubt that he had entered into the conspiracy and had acted with the requisite intent as of the time of the Joseph Passarelli loan. In fact, during deliberations the jury requested that certain testimony relative to the Joseph Passarelli loan be read back to them. (Tr. 905, 908).

threat of Passarelli's loss of his property through foreclosure, approved two additional loans—one for Thomas Power and one for a corporate entity controlled and owned exclusively by Passarelli, Westchester Avenue Used Cars, Inc. (Tr. 141-42, 145-48). Since no financial statement of any kind was submitted on behalf of the corporate entity Westchester Avenue Used Cars, Inc., the jury could treat as incredible Cleary's claim that he believed this was a corporation with sufficient assets to repay a five thousand dollar loan.

Thus, the evidence here overwhelmingly demonstrated that Cleary, Healy and Passarelli entered into a scheme to direct loans to Passarelli through deception to prevent superior bank officials from learning that Passarelli was the real loan recipient. In this respect *United States v. Iannelli*, 461 F.2d 483 (2d Cir. 1972), *cert. denied*, 409 U.S. 980 (1973) provides a useful benchmark for measuring the sufficiency of the evidence.

In *Iannelli*, a bank vice president had instructed a bank official, Michaels, not to loan any further money to Iannelli. That instruction was circumvented by the opening of an account at the bank in the name of Sioux Realty Construction Corporation. Iannelli controlled the Sioux account. Michaels thereafter approved loans to five individuals whom he met, but had the loan proceeds credited directly to the Sioux account. Thus, while the loans were made to the "named borrowers," the proceeds went into accounts controlled by Iannelli. In reviewing the sufficiency of evidence on appeal, this Court in *Iannelli* found no difficulty as to Iannelli and concluded that the evidence was sufficient even against the "straw man" loan borrower, a question which the Court viewed as "more substantial" than the sufficiency as to the insiders.* 461 F.2d at 485-87.

* Michaels had pleaded guilty prior to trial in *Iannelli*.

In the instant case Cleary, like Michaels arranged loans in the names of intermediaries while knowing that the proceeds in fact were going into an account controlled by a person who could not qualify for loans. In fact, Cleary never met the intermediaries and didn't even know if they were real people. Nevertheless, Cleary approved three five thousand dollar loans to three corporate entities owned and controlled by Passarelli, and four five thousand dollar loans to individuals who were not the true borrowers.

Cleary argues, however, that, as a matter of law, he can not be guilty of wilful misapplication of bank funds because it is not a crime to approve loans intended for an unnamed individual so long as the named borrower is financially capable. This defense was for the jury which, on this record, could not help but conclude that Cleary—who had never met or sought to interview any of the several named borrowers—knew that the named borrowers individually had no idea they were responsible for any loans. Cleary had no realistic expectation that anyone but Passarelli hoped to repay the loan. Thus, Cleary does not fall within the First Circuit's rule in *United States v. Gens*, 493 F.2d 216 (1st Cir. 1974) that there is no misapplication where the named debtor is *both* financially capable and fully understands his responsibility to repay the loan even if he intends to turn over the proceeds to a third party.*

Cleary also suggests that he is not guilty of wilfully misapplying bank funds because he did not receive any

* Significantly, Judge Carter charged on this aspect of Cleary's defense, and as noted above the jury by its verdict rejected it. Judge Carter instructed the jury that a loan is not a sham or a wilful misapplication where the named debtor is financially capable and understands his responsibility to repay a loan he has consented to, even if the bank official knew that the funds would be turned over to a third party. (Tr. 882-83).

bribes or gratuities in connection with the fraudulent loans. There is, of course, nothing in the relevant precedent or the language of the statute to support Cleary's novel argument that the bank officer must receive a direct monetary benefit in order to commit the offense. Indeed, the bank officer in *United States v. Giordano*, 489 F.2d 327 (2d Cir. 1973) was guilty of misapplying bank funds despite the failure to show that he had received any direct financial benefit to participate in the bank misapplication scheme. Cleary's argument that he received no kickbacks in connection with the disputed loans was properly one for the jury. Since Cleary vigorously argued the point to the jury, which by its verdict correctly rejected this purported defense, he has no further basis to complain.

Finally, Cleary would have this Court believe that the Government's case against him rested solely on the argument that he violated bank rules. While the Government obviously contended in the District Court that Cleary's disregard for bank practices and rules * was

* The Government established that Cleary's actions in approving loans for Healy completely disregarded bank practices. He approved two five thousand dollar loans, one to Richard Fletcher and one to Margaret Fletcher, knowing that Richard Fletcher was the recipient in each case, in order to circumvent the rule that he could only approve a \$5,000 loan. (Tr. 14). Cleary never met any of the prospective borrowers, and had no idea if any of them were capable of repaying the loan. He approved a loan to Edward Hogan without requiring Hogan to submit any type of financial statement, extended the proceeds of the Joseph Passarelli loan before the note was signed or the financial statement completed, and approved a loan to one of Passarelli's companies—Westchester Avenue Used Cars, Inc.—without requiring any financial statement about the company. This activity violated bank rules and practice. (Tr. 17-20, 24, 171-72). Moreover, Cleary ignored bank practice by failing to obtain chattel mortgage security agreements in connection with the Power and French loans prior to disbursing the funds. (Tr. 22).

probative of his motive and intent to defraud the bank, such proof certainly was not the exclusive basis for Cleary's criminality, nor had the prosecution ever so argued to the jury. The thrust of the Government's claim was that Cleary was a vital and knowing participant in a scheme to loan money, through deceptive and intentionally fraudulent means to an individual who was unable to borrow the money in his own name from Cleary's bank. The Government established this fact beyond any possible doubt.

B. The Proof as to Passarelli

As with his co-defendant Cleary, Passarelli's claim of insufficiency on this record is simply astounding, and ignores the testimony of the cooperating defendant, Healy. Healy's testimony alone was sufficient to support a guilty verdict on Counts One, Seven, Eight, Ten and Twelve; Healy's testimony combined with the testimony of others and the exhibits received overwhelmingly demonstrated Passarelli's guilt. The Government established that Passarelli entered into the scheme to defraud Barclay's Bank, and throughout the scheme, forged and completed documents necessary to obtain loans without regard to the veracity of the statements contained in the documents.

As detailed earlier in the Statement of Facts, the evidence showed that from September, 1975 and thereafter throughout the fall, Passarelli, in desperate need of capital to prevent the imminent foreclosure of his marina, (Tr. 95-99, 335), agreed with Healy to secure financing through Cleary at Barclay's. Passarelli was well aware of his own prior difficulties at Barclay's Bank, (Tr. 405, 417, 622, 716), and knew that his name was anathema at the Bank. Thus, he and Healy decided to use the names of others as the fictitious borrowers—people such as Passarelli's mother-in-law, and Liberatore

—while the loan proceeds would be received and used by Passarelli. (Tr. 100-02). Through this scheme Passarelli and Healy arranged for seven five thousand dollar loans from Barclay's Bank. In each instance Passarelli, Healy, and Cleary insured that Passarelli's identity as the true borrower was disguised.

Moreover, to facilitate the unlawful plan documents containing false information typically were submitted to the bank. Thus, the documents submitted to the bank to obtain the loan for 8626 Realty Corporation contained false information provided by Passarelli.* (Tr. 115-18, 373-76). Liberatore, although listed as an officer of the corporation, in fact never was a corporate officer, and never gave Passarelli permission to sign his name to a loan application. (Tr. 375). Undeterred by that fact, Passarelli forged Liberatore's name to the documents forming the basis for Count Ten, and sought to mislead the bank into believing that Liberatore was a responsible corporate officer upon whom the bank could rely.

The documents submitted to the bank to obtain the Thomas Power loan formed the basis for Counts Seven and Twelve. Passarelli gave Healy completed documents showing that Power wanted to borrow five thousand dollars in order to purchase a boat. (Tr. 142-43; GX 23). The loan application contained false information about Power's background and financial capabilities. (Tr. 309-12).**

* The Government further maintained that the documents submitted to the bank in order to obtain the loan in Mary Roccario's name, Count Nine, and Carl French's name, Count Eleven, contained false information. The financial statement for Carl French was completed by Healy based on false information provided by Passarelli (Tr. 130); the application was signed by Passarelli. (Tr. 130). Similarly, Healy completed the financial statement for Mary Roccario based on false information given to him by Passarelli. (Tr. 103). The jury acquitted Passarelli on Counts Nine and Eleven.

** This loan application was the basis for Count Ten of the indictment.

The Government further demonstrated Passarelli's consciousness of guilt by proving that he endeavored in two respects to impede the investigation that led to this indictment. First, he lied to an FBI agent by maintaining that Power had purchased a boat from him. In fact, Passarelli went to extraordinary lengths to perpetuate his prevarication. He showed the agent a check he had allegedly written to Power representing a refund for the boat. The check was phony and simply designed to mislead. Passarelli also showed the FBI agent the boat he claimed Power had purchased from him. In fact, Power had never purchased a boat, and had never spoken to Passarelli about buying one. (Tr. 340-42). Passarelli simply selected a boat currently in his marina, showed it to the agent, and told the agent that the boat was Power's. Second, Passarelli attempted to suborn Liberatore by urging him to testify that he had given Passarelli permission to use his name on a loan application. (Tr. 376).

In short, the facts here simply do not present the type of "troublesome" problems this Court previously has referred to in reviewing the sufficiency of evidence to support a bank customer's conviction for aiding and abetting the wilful misapplication of bank funds. See *United States v. Giordano*, 489 F.2d 327, 330 (2d Cir. 1973); *United States v. Docherty*, 468 F.2d 989, 993-95 (2d Cir. 1972). Unlike the bank customer in *United States v. Docherty*, Passarelli knew full well what the bank employee, Cleary, was doing. Indeed while Cleary benefited from the scheme initially by generating business and later by approving the Joseph Passarelli, Thomas Power, and Westchester Avenue Used Cars, Inc., loans in order to protect himself from losing his position at the bank, it was Passarelli who throughout stood to gain the most from this scheme. Thus, Passarelli's situation is a far cry from that of the defendant Docherty who "neither

obtained nor sought any personal gain" from the bank employee's scheme. The jury plainly was entitled to conclude that, far from an unwitting dupe of a bank employee who used him for his personal gain, Passarelli was an equal prime mover with Cleary and Healy in the fraudulent scheme convincingly proved at trial.

POINT II

The District Court's Charge On Intent Was Correct.

Cleary challenges the propriety of a portion of Judge Carter's charge relating to intent under the bank misapplication counts. He contends that the District Court erroneously substituted the element of "exposure to loss" for "intent to injure or defraud the bank." This argument simply distorts Judge Carter's charge to the jury. The charge unambiguously informed the jury that an essential element of the crime cognizable by Title 18, United States Code, Section 656, was that Cleary acted with intent to injure or defraud the bank.*

The District Court lucidly instructed the jury that to return a guilty verdict against the defendant for a violation of the bank misapplication statute they must find four elements to have been proved beyond a reasonable doubt. One of those elements stated was that

"Cleary acted with the intent to injure or defraud the Barclay's Bank of New York and with

* The literal language of section 656 does not require proof of an intent to injure or defraud the bank. This Court, however, has held that the Government must prove that the defendant acted with the intent to injure or defraud the bank in order to convict under this statute. *United States v. Giordano*, 489 F.2d 327, 330-31 (2d Cir. 1973); *United States v. Docherty*, 468 F.2d 989, 993-95 (2d Cir. 1972).

the knowledge and intent that the misapplication of funds or credit exposed Barclay's Bank to jeopardy of loss." (Tr. 881).

Moreover, Judge Carter reiterated to the jury that if they should conclude that Cleary wilfully misapplied bank funds, "you must then consider whether he acted with an intent to injure or defraud the bank." (Tr. 883). The District Court then instructed for a third time that

"the government must prove beyond a reasonable doubt that the defendant acted with an intent and knowledge that the bank would be injured or defrauded." (Tr. 883).

Finally, to assist the jury in understanding the legal significance of the term "intent to injure or defraud," the District Court provided the jury with the following guidance:

"It (intent to injure or defraud) means to act knowingly and with the specific intent to deceive or cheat, for the purpose of either causing financial loss to another, or bringing about some financial gain to one's self." (Tr. 883).

Notwithstanding the trial court's clear instructions on this point to the jury on three separate occasions, Cleary contends that additional explanatory language was in error and had the effect of obviating the element that defendant intended to injure or defraud the bank. Specifically, Cleary objects to the following language:

"Even if it was not Mr. Cleary's *purpose* to injure or defraud Barclay's Bank, if he knew that the natural effect of his actions would be to expose the bank to loss, injury or fraud, the requisite intent is established." (Tr. 884) (emphasis added).

First, in view of the District Court's repeated admonition that the jury had to determine whether Cleary acted with the intent to defraud or injure the bank, the assertion that this language removed that essential element is indeed fanciful. Reading the charge as a whole, as it must be, *United States v. Nemes*, Dkt. No. 76-1584, slip op. 3509, 3511 (2d Cir., May 16, 1977); *United States v. Guillette*, 547 F.2d 743 (2d Cir. 1976), it is clear that Judge Carter's explanatory comment did not focus the jury's attention away from the correct essential element. Indeed, the thrust of the District Court's instruction about "purpose" was simply to inform the jury that the Government need not prove that defendant's *motive* was to injure the bank;* rather if Cleary *knew* that the natural effect of his actions was to expose the bank to loss, injury or fraud, the requisite intent was established.**

Second, this Court's opinion in *United States v. Giordano*, *supra*, 489 F.2d at 333-34, makes clear that Judge Carter's charge was more than adequate. In *Giordano* the trial judge failed to use the words "intent to injure or defraud the bank" in describing the essential elements of the crime of misapplication of bank funds. This Court

* Of course, the District Court acted properly in charging the jury that the Government need not establish Cleary's motive. See *United States v. Tokoph*, 514 F.2d 597, 603 (10th Cir. 1975); *Golden v. United States*, 318 F.2d 357, 361 (1st Cir. 1963); *Galbreth v. United States*, 257 F. 648, 656 (6th Cir. 1918).

** In fact the District Court's use of the phrase "knew" was arguably more than that to which the defendant was entitled. The court could have simply told the jury that Cleary's intent could be established by a deliberate disregard of whether his actions would expose the bank to loss, injury or fraud. See *United States v. Hanlon*, 548 F.2d 1096, 1100-09 (2d Cir. 1972). *United States v. Bernstein*, 533 F.2d 775, 796-97, n. 17 (2d Cir. 1977); *United States v. Jacobs*, 475 F.2d 270, 287 n. 37 (2d Cir.), *cert. denied*, 414 U.S. 821 (1973).

concluded that the language used by the trial court was sufficient. The Court held that "the dominant purpose required" for the violation is not an actual intent to defraud the bank, but that the requisite intent is established "by proving that the natural result of the unlawful act is likely to injure the bank." *United States v. Giordano*, *supra*, 489 F.2d at 333.* Judge Carter not only used the "natural result" language approved by this Court in *Giordano*,** but on three separate occasions used the "intent to injure or defraud" language.*** See *United States v. Fillian*, 541 F.2d 1156, 1160 (5th Cir. 1976); *United States v. Tokoph*, *supra*, 514 F.2d at 603. This instruction was entirely correct and proper.

* Indeed, in assessing the sufficiency of the evidence, this Court in *Giordano* pointed out that:

"The natural consequences of the connivance of the bank officers in the wrong was to put the bank in jeopardy of loss. Whether there was actual purpose to injure the bank or not, there certainly emerged an intent to defraud the bank by 'willfully misapplying the funds and credit of the bank.'" 489 F.2d at 331.

The instruction given by Judge Carter about which Cleary complains merely tracked this correct statement of law set forth in the *Giordano* decision.

** Cleary's complaint relating to the charge is somewhat disingenuous since his own attorney provided Judge Carter with a copy of the District Court's charge in *United States v. Giordano*, claiming that it was a useful model. (Tr. 261, 541).

*** See also *Golden v. United States*, 318 F.2d 357, 361 (1st Cir. 1963) where the Court upheld a charge that "[t]he intent to injure or defraud must not necessarily have been the purpose for the doing of the act, as long as the natural result of that conduct would be to injure or defraud the bank." The First Circuit in *Golden* stated that this language was designed to mean "no more than that the injuring or defrauding of the Bank need not have been the motive for the defendant's acts."

POINT III**The District Court Did Not Err In Limiting Evidence Relating To Passarelli's Offer To Repay The Loans.**

Passarelli contends that his convictions on Counts Seven and Eight must be reversed because the District Court limited evidence of his offers—made only after the fraudulent scheme had been detected by bank officials—to repay and secure the loans due Barclay's Bank. The District Court's rulings on this issue were entirely proper and do not justify reversal of defendant's convictions.*

On approximately December 21, 1975, officials of Barclay's Bank discovered that Cleary had been disbursing loan proceeds prior to placing the loans on the bank books,** and had approved loans to Gustavo Passarelli—"an individual or a corporation controlled by (that) individual with whom we had had certain credit problems in the past." (Tr. 26). The evidence further revealed that over the next month Cleary unsuccessfully made efforts to collect on these loans. (Tr. 28). Obviously, once the bank discovered that Cleary had made these improper loans to Passarelli, defendants had to terminate their scheme.

Against this background, Passarelli at trial attempted to elicit evidence relating to his subsequent offers to repay the loans. Passarelli's counsel elicited from Edward Flanagan, manager of the Barclay's Bank, that after

* Passarelli does not attack his convictions on Counts 10 and 12 on this ground. Accordingly, under the concurrent sentence doctrine. With respect to the prison term imposed this Court need not reach the issue raised in this point, assuming the issues directed to Counts 10 and 12 are resolved against Passarelli. See *United States v. Mejias*, Dkt. No. 76-1384, slip op. 2269 (2d Cir., March 10, 1977):

** This was a violation of bank procedure. (Tr. 26).

the bank learned of defendants' illegal activities Passarelli indicated his willingness to provide some collateral for the loans, and that there were discussions about arrangements for repayment. (Tr. 64). Passarelli's counsel then argued to the court that he should be permitted to extend this inquiry about offers to repay the loans. Judge Carter sustained the Government's objection to this inquiry "that the crime is completed when he (Passarelli) has done what he did in this matter." (Tr. 161, 162). Passarelli contends that this ruling, and the trial court's subsequent refusal to allow further evidence in the defense case of defendant's offer to repay the loans, were in error.

The probative value and collateral consequences of the proposed inquiry bear initial examination. Evidence that defendant offered to repay fraudulently obtained loans only after the outside discovery of a long-standing course of intentionally misleading and deceptive conduct was of such dubious relevance on the matter of his earlier intent as to raise a substantial question of admissibility for the trial judge. The timing of such a mere offer to repay, made only after criminal conduct had been completed and detected, logically does not shed significant light on the question of evil intent while, at the same time, invites potential confusion of the issues before the jury and litigation over collateral matters. Accordingly, the admissibility of acts of subsequent conduct "to prove absence of evil intent" is a matter firmly committed to the wide discretion of the trial judge who "must consider the circumstances surrounding the offer" of proof. And, the trial court's exclusion of such evidence is not error in the absence of a clear abuse of discretion. *Hayes v. United States*, 227 F.2d 540, 543 (10th Cir. 1955). See also *Kohatsu v. United States*, 351 F.2d 898, 904 (9th Cir. 1965); *Turner v. United States*, 222 F.2d 926, 933 (4th Cir. 1955); *United States v. Stoehr*, 196 F.2d 276

(3rd Cir. 1952). Indeed, this Court has consistently held that a trial court's ruling on the admissibility of evidence will only be disturbed on appeal for a clear abuse of discretion. See *United States v. Corr*, 543 F.2d 1042 (2d Cir. 1976); *United States v. Leonard*, 524 F.2d 1076, 1092 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976); *United States v. Gottlieb*, 493 F.2d 987 (2d Cir. 1974); *United States v. Bowe*, 360 F.2d 1, 15 (2d Cir.), *cert. denied*, 385 U.S. 961 (1966).

Under the facts and circumstances of this case Judge Carter properly exercised his broad discretion. In the face of clear and convincing evidence that Passarelli, long before his repayment offers, had participated in submitting numerous false loan applications to the bank for the exclusive purpose of securing loans he could not obtain legitimately, that the scheme was designed principally for his direct benefit, and that he never had the financial resources to repay the loans, proof of his subsequent self-serving offer would have been essentially irrelevant to the jury's determination of his intent and would have opened the door to the side issue of the genuineness of his mere offers to repay.*

Passarelli's considerable reliance to the contrary on *United States v. Matot*, 146 F.2d 197 (2d Cir. 1944), is misplaced in the circumstances of this case. While this Court in *Matot* reversed a conviction on the ground of

* This is not a case where defendant had actually made repayments to the victim, as opposed to mere reoffers to repay. Of course whether evidence of actual repayment should be admitted is still a question for the trial court's discretion. However, in that situation at least there is no collateral question as to the sincerity of the offer to repay. See *United States v. Wicoff*, 187 F.2d 886, 890-91 (7th Cir. 1951); *Heindel v. United States*, 150 F.2d 493 (6th Cir. 1945).

exclusion of evidence of an intent to repay an overdraft of bank funds, that case must be viewed in the context of its unique facts and does not depart from the otherwise settled rule that the admissibility of subsequent conduct to prove absence of intent is a matter for the trial court's discretion.

In *Matot* a bank teller, Holmes, permitted approximately eighty depositors, including defendant Matot, to draw checks upon their accounts even when the accounts were insufficient to cover the checks. After the bank discovered the teller's defalcations, the bank's directors asked Matot to pay the overdrafts. Matot agreed to make the necessary arrangements. Several days later Matot told the bank president that he would sell some real estate to repay the overdrafts, and the bank president urged Matot not to sell the property at a sacrifice.

At Matot's trial for misapplication of bank funds, the court admitted testimony relating to his initial offer to pay, but excluded testimony about the meeting with the bank president who told Matot not to sell his real estate at a sacrifice. This Court held that the exclusion of such evidence "in so close a case," was error entitling *Matot* to a new trial, but that "in a clearer case we might disregard the error." (416 F.2d at 198-99).

Judge Hand's opinion in *Matot* observed that Matot was a prosperous businessman who could have "amply responded to all his indebtedness to the bank." Indeed, the Court had substantial doubt as to Matot's guilt, and could not comprehend from the evidence any motive for him to be involved in a scheme with intent to defraud the bank. Thus, properly viewed, *Matot* is no more than a case where this Court's scrutiny of the evidence of guilt of the customer in a bank misapplication charge gave rise to

considerable doubt, and accordingly, error was found in the trial court's ruling on a "close" evidentiary question. See also, *United States v. Giordano*, *supra*. Unlike *Matot*, the facts before the trial judge and before this Court here did not and do not admit of any doubts as to the bank customer's motive, intent and participation in the misapplication scheme: Passarelli desperately needed capital to save his business, was incapable of securing the necessary funds legitimately, and, accordingly, arranged with Healy and Cleary to obtain the funds illegally.*

In any event, Passarelli's claim of prejudice from Judge Carter's ruling on this question is completely without substance on this record. Notwithstanding that evidence was before the jury that showed Passarelli's efforts to repay the loans, and Judge Carter expressed a willingness to allow defendant to argue to the jury lack of intent from such evidence, defense counsel chose *not* to make the argument. Thus, the claim that the defense was somehow thwarted by the District Court's rulings is simply unavailing.

Government Exhibits 49, 50, 52 and 53 were charge-off loan reports relating to the loans in the names of 8626 Realty Corp., Westchester Avenue Marina, Inc., Joseph Passarelli, and Westchester Avenue Used Cars, Inc. Each of these reports was received as evidence in its entirety. (Tr. 32-38). Each report explicitly referred to a January 19, 1976, conversation among Passarelli and bank officials concerning a *repayment program* for the loans. The exhibits also referred to a February 9, 1976 letter from

* In *Brown v. United States*, 283 F.2d 792, 795 (10th Cir. 1960) Judge Blackmun, now Justice Blackmun, made clear that the facts in *Matot* were critical. He noted that in *Matot* the Court had doubt of defendant's guilt and that "in a clearer case we might disregard the error."

Passarelli.* Judge Carter explicitly informed Passarelli's counsel that he could argue the absence of intent to the jury based upon the charge-off loan reports as well as Flanagan's testimony. (Tr. 170). Passarelli's counsel did not take advantage of this opportunity.

In sum, Passarelli was in a position to argue to the jury the precise defense of which he now claims he was deprived. In the face of his deliberate decision not to press this contention upon the jury, his present protests of prejudicial error surely sound hollow and should be rejected.

POINT IV

The Government Established That The False Statements In Counts Ten And Twelve Were For The Purpose Of Influencing The Bank, And The Court's Instruction On This Issue Was Correct.

Passarelli contends that the Government was obligated to prove and failed to do so, that the false statements in Counts Ten and Twelve related to "material" facts, and that the District Court erred in refusing to charge the jury in accordance with his requested instruction on

* The charge-off loan reports stated the following:

"On January 19, 1976 Gus Passarelli stated to two senior officers of the bank in the presence of a representative of our general counsel that he would submit a repayment program and collateralize the loan by boats, fork lifts and/or an automobile. In letters dated February 9, 1976 Mr. Passarelli stated 'We have seven boats, four engines, two small fork lifts and a 1975 Mark IV which wholesales for \$30,000. We may be able to pay some of the money by April. . .' Mr. Passarelli has not responded to our request for more precise information and a definite fixed repayment plan and we have, therefore, authorized our general counsel to proceed legally in this matter. The FBI is investigating." (GX 49, 50, 52, 53).

materiality. These arguments disregard the language of the statute, and fail to comprehend that the court's instructions fully explicated the elements of Title 18, United States Code, Section 1014.

Title 18, United States Code, Section 1014 does not contain a materiality requirement. Rather, the statute proscribes the making of "any false statement or report . . . for the purpose of influencing in any way the action . . ." of a bank. The language "for the purpose of influencing" is designed only to define the quality of the requisite intent, *United States v. Niro*, 338 F.2d 439, 441 (2d Cir. 1964). No court has ever read into the statute "materiality" as an element of the offense, as defendant now urges in this Court.*

Judge Carter instructed the jury that, in order to convict, it must find "the false statement or report was made for the purpose of influencing the bank's action on the loan application." (Tr. 887). He further instructed that the law requires that "statements which have the capacity of influencing in any way the action of a bank from which the loan is sought be accurate or not knowingly false." (Tr. 888). Finally, the trial court defined the phrase "for the purpose of influencing," as meaning that the person making the false statements intended that the bank take action because of the statements. (Tr. 890). These instructions were proper and fully consistent with the statute and relevant law. See *United States v. Sabatino*, 485 F.2d 540, 544 (2d Cir.

* In describing the type of false statement punishable by section 1014, courts have used the language "of a material fact" and have indicated that the statement must have the capacity to influence the bank. *United States v. Braverman*, 522 F.2d 218, 223 (7th Cir. 1975); *United States v. Goberman*, 458 F.2d 226, 229 (3rd Cir. 1972). However, this does not mean that the Government must have proven that the statement was "material" or actually relied upon by the bank.

1973).^{*} Therefore, most assuredly this is not a case where the court failed to explicate the elements of the offense. See *United States v. Dixon*, 536 F.2d 1388, 1397 (2d Cir. 1976); *United States v. Howard*, 506 F.2d 1131 (2d Cir. 1974).

Passarelli's further contention that since the indictment used the term "false material statement," the Government was obliged to prove materiality, is frivolous in the extreme. At most, use of the term "material" was surplusage that Passarelli could have moved pretrial—but did not—to strike. He certainly was not entitled to a jury instruction adding materiality to the elements of the offense.^{**}

Finally, interwoven into Passarelli's claim that the trial court should have charged materiality as an essential element is the argument that the Government failed to prove the false statements had the capacity to influence the bank. This contention is specious. The false statements on the financial applications submitted in connection with the loan to 8626 Realty Corporation con-

^{*} Indeed, Passarelli's requested instruction included the language that the "statement had a natural tendency to influence or was capable of influencing" the bank's decision. (A-241). This request was remarkably similar to a portion of the District Court's charge that the law requires that statements having the capacity to influence the bank in any way be accurate or not knowingly false. (Tr. 888).

^{**} In *United States v. Rodriguez*, 545 F.2d 829, 832 (2d Cir. 1976) this Court held that the trial court had not erred in instructing the jury that they could find the defendant guilty of tax evasion even if they did not find that his source of income was sale of heroin, as the indictment had charged. This Court stated that the source of income was surplusage, and, since it was not an element of the offense charged, the jury could be instructed to disregard it. See also, *United States v. Dixon*, 536 F.2d 1388, 1397 (2d Cir. 1976) ("the word 'knowingly' was surplusage in Counts II and VI and in effect the judge treated it as such. . .").

cerned Carmine Liberatore's finances. (GX 4, 5, 7, 8). Obviously, statements relating to financial condition go to the heart of the loan application and have the capacity to influence the bank.* It was equally beyond question that Passarelli submitted the applications purporting to show Liberatore as a corporate officer, and Power as the loan recipient, because he knew his own identity as the loan recipient had to be disguised. Passarelli plainly understood that if the bank knew he was applying for a loan the funds he so desperately needed would not have been disbursed. Accordingly, the conclusion was inescapable that Passarelli's false statements were both part of the subterfuge to disguise his identity as the actual borrower and calculated to influence the bank in disbursing the loan.

CONCLUSION

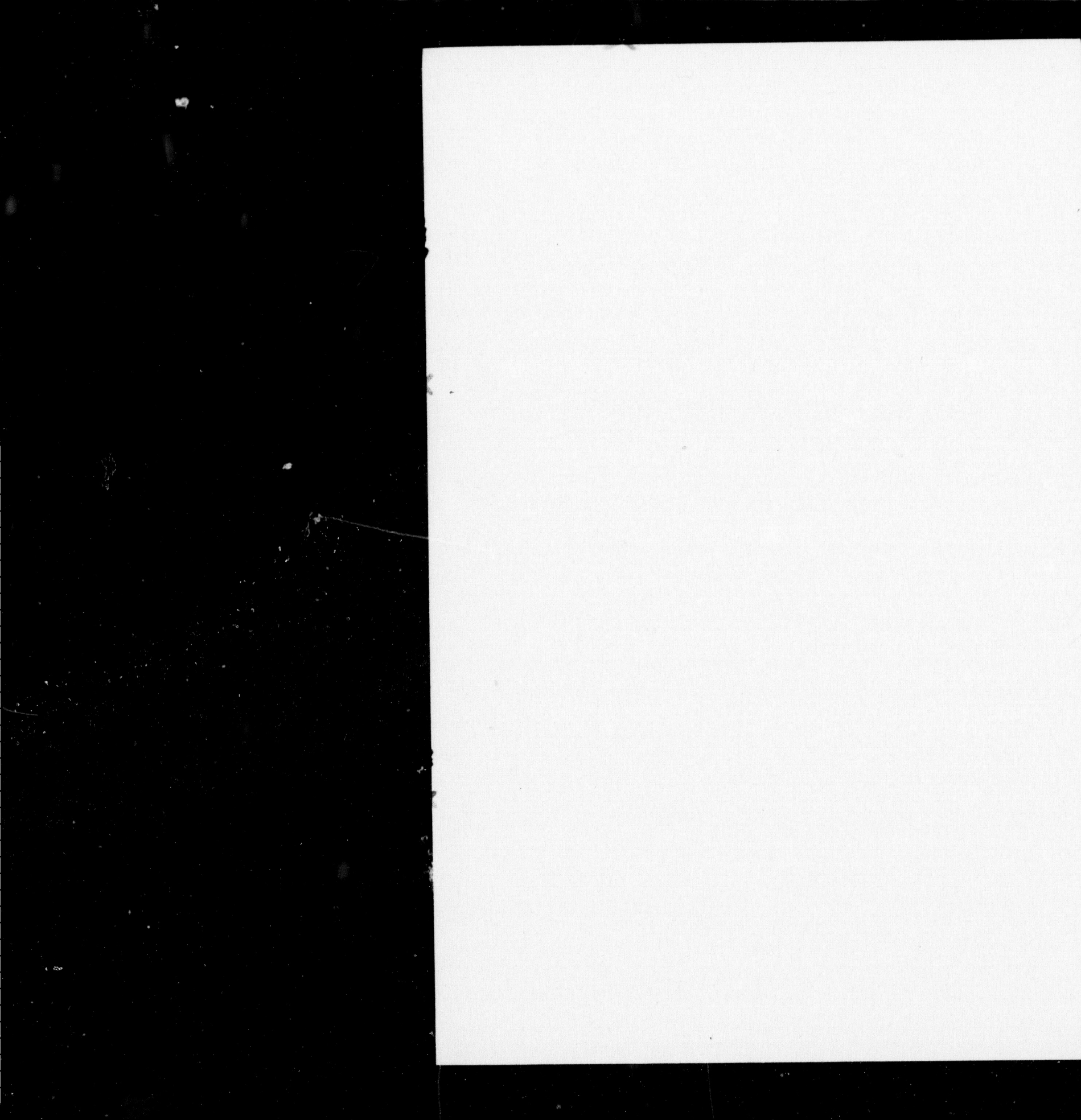
The judgments of conviction should be affirmed.

Respectfully submitted,

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* In addition the statements submitted in connection with the 8626 Realty Corporation loan made it appear as if Liberatore was a corporate officer, a fact that Liberatore denied from the witness stand. (Tr. 371-90). Similarly, the statements on the Thomas Power application—which Power himself testified were false, (Tr. 308-12)—dealt with his financial condition, and such statements do have the capacity to influence the bank. (GX 23).



AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Richard Weinberg being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 5th day of July, 1977,
he served a copy of the within brief by placing the same
in a properly postpaid franked envelope addressed:

1) Daniel Murphy, Esq.
200 East 42nd St.
New York, New York 10017

2) Morton Berger, Esq.
13 Eastbourne Drive
Spring Valley, New York 10977

And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

Richard Weinberg

Sworn to before me this
5th day of July, 1977

Mary L. Arent
MARY L. ARENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1979

